(2)

No. 04-1368

Supreme Court, U.S.
JUL 1 8 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES CASON, Acting Assistant Secretary-Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RESPONDENT CHEROKEE NATION IN OPPOSITION

Of Counsel:

A. DIANE HAMMONS
JOHN E. PARRIS
CHEROKEE NATION
DEPARTMENT OF JUSTICE
P.O. Box 948
Tahlequah, OK 74465
(918) 456-0671

* Counsel of Record

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Respondent Cherokee Nation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether any issue of national importance is presented where the court of appeals, relying principally upon this Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), determined that the Secretary of the Interior had acted arbitrarily, capriciously and contrary to law when in 1996 she officially recognized as an independent "Delaware Tribe," wholly separate from the Cherokee Nation, some descendants of Delaware Indians who pursuant to an 1867 Agreement—entered into under authority of an 1866 Cherokee Nation Treaty with the United States and approved by the President as required therein—expressly had agreed that henceforth they "shall become members of the Cherokee Nation" and whose "children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

2. Whether any issue of national importance is presented where the court of appeals held that the Secretary of the Interior lacked authority to create, uniquely for this case, "a procedure heretofore unknown in the law—'retract and declare'—to purportedly re-recognize the Delawares" outside the framework of the Federally Recognized Indian Tribe List Act and its implementing regulations.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
INTRODUCTION	2
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE PETITION	23
CONCLUSION	30
APPENDIX	
Opinion of the Court of Appeals for the D.C. Circuit, filed July 15, 1997, as amended September 19, 1997	1a

TABLE OF AUTHORITIES

CASES	Page
Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990), *superceded by* 29 U.S.C. § 1854	21
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986)	20
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)	24
Cherokee Nation v. Babbitt, 944 F. Supp. 974 (D.D.C. 1996)	2, 19
Cherokee Nation v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997)	*passim*
Cherokee Nation v. Journeycake, 155 U.S. 196 (1894)	*passim*
Delaware Indians v. Cherokee Nation, 38 Ct. Cl. 234 (1903)	13
Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904)	*passim*
Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977)	*passim*
Delaware Tribe of Indians v. United States, 128 F. Supp. 391 (Ct. Cl. 1955)	26
FPC v. Texaco Inc., 417 U.S. 380 (1974)	21, 24
General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004)	25
James v. United States Dep't of Health & Human Servs., 824 F.2d 1132 (D.C. Cir. 1987)	25
Journeycake v. Cherokee Nation and the United States, 28 Ct. Cl. 281 (1893)	11
Miami Nation of Indians of Ind., Inc. v. United States Dep't of Interior, 255 F. 3d 342 (7th Cir. 2001)	25
Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	21, 24

TABLE OF AUTHORITIES—Continued

	Page
SEC v. Chenery Corp., 332 U.S. 194 (1947)	24
Service v. Dulles, 354 U.S. 363 (1957)	20
Watt v. Alaska, 451 U.S. 259 (1981)	25
Western Shoshone Bus. Council v. Babbitt, 1 F.3d 1052 (10th Cir. 1993)	25
CONSTITUTION	
Cherokee Nation Const.	4, 29
TREATIES AND AGREEMENTS	
Treaty with the Cherokee, July 19, 1866, 14 Stat. 799	*passim*
Treaty with the Delaware, July 4, 1866, 14 Stat. 793	5, 7, 16, 27
1867 Agreement between the Cherokee Nation and Delaware Tribe	*passim*
STATUTES	
Act of October 19, 1888, ch. 1211, 25 Stat. 608	9, 10
Act of October 1, 1890, ch. 1249, 26 Stat. 636	10
Act of June 28, 1898, ch. 517, § 25, 30 Stat. 495	12
Act of February 27, 1925, 43 Stat. 812	15
Act of March 3, 1927, Pub. L. 69-717, ch. 314, 44 Stat. 1358	15
Administrative Procedure Act, 5 U.S.C. §§ 701-706	19, 20
Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, *codified in part at* 25 U.S.C. §§ 479a and 479a-1	29
Indian Claims Commission Act of August 13, 1946, ch. 959, 60 Stat. 1049, as amended, *formerly codified at* 25 U.S.C. §§ 70-70v-3	15, 16, 26, 27

TABLE OF AUTHORITIES—Continued

Page

Joint Resolution to Provide for the Establishment of the American Indian Policy Review Commission, Pub. L. 93-580, 88 Stat. 1910 (1975), as amended 16
25 U.S.C. § 70a (omitted) 16, 26, 27
25 U.S.C. § 1291 26
28 U.S.C. § 1254(1) 2
29 U.S.C. § 1854 21

FEDERAL REGULATIONS

25 C.F.R. pt. 54 (1979) 16
25 C.F.R. pt. 83 ..... 16, 18, 25, 29
25 C.F.R. § 83.5(a) 17
44 Fed. Reg. 7,235 (Feb. 6, 1979) 17
46 Fed. Reg. 35,360 (July 8, 1981) 17
47 Fed. Reg. 53,130 (Nov. 24, 1982) 17
48 Fed. Reg. 56,862 (Dec. 23, 1983) 17
50 Fed. Reg. 6,055 (Feb. 13, 1985) 17
53 Fed. Reg. 52,829 (Dec. 29, 1988) 17
58 Fed. Reg. 54,364 (Oct. 21, 1993) 17
60 Fed. Reg. 9,250 (Feb. 16, 1995) 17

OTHER MATERIALS

Absentee Delaware Tribe of Oklahoma, et al. v. United States, 21 Ind. Cl. Comm. 344 (1969) ... 15, 26
American Indian Policy Review Commission, FINAL REPORT (GPO 1977) 16
Appeal of Delaware Tribe of Indians, IBIA No. 02-65-ALJ Recommended Decision of July 26, 2002, *accepted and declared final*, Int. Bd. Indian App. Sept. 24, 2002 4
COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (1982) 3, 4, 22, 28

TABLE OF AUTHORITIES—Continued

	Page
Delaware Indians in Cherokee Nation–Allotment, 25 Pub. Lands Dec. 297 (1897)	14
Delaware Tribe of Indians v. United States, 2 Ind. Cl. Comm. 253 (1952)	26
41 AM. JUR. 2D *Indians* § 6 (2005)	28
42 C.J.S. *Indians* § 27 (2005)	28

IN THE

Supreme Court of the United States

No. 04-1368

DELAWARE TRIBE OF INDIANS,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES CASON, Acting Assistant Secretary-Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT CHEROKEE NATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. 1a-30a), as amended on denial of rehearing, is reported at 389 F.3d 1074. The opinions of the District Court for the Northern District of Oklahoma are reported at 241 F. Supp. 2d 1374 (Pet. 31a-55a) and 241 F. Supp. 2d 1368 (Pet. 56a-66a).

The opinions of the Tenth Circuit granting in part the respondent Secretary of the Interior's petition for rehearing (Pet. 67a-68a), and denying the petitioner's petition for rehearing (Pet. 69a-70a), are unreported. The Orders of the Tenth Circuit denying petitioner's application to stay the mandate, and denying petitioner's motion to recall the

mandate and for reconsideration of the denial of a stay of the mandate, are unreported and omitted from the appendix to the Petition.

The opinion of the Court of Appeals for the District of Columbia Circuit (prior to transfer of the case to Oklahoma) is reported at 117 F.3d 1489, but is omitted from the appendix to the Petition. It is reproduced here at Respondent's Appendix 1a-26a ("*infra* __a"). An earlier opinion of the District Court for the District of Columbia is reported at 944 F. Supp. 974 (D.D.C. 1996), but also is omitted from the appendix to the Petition.

JURISDICTION

The opinion of the Tenth Circuit was entered November 16, 2004, and amended February 16, 2005. The petition for a writ of certiorari was filed April 11, 2005. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioner, but not the Secretary of the Interior, asks this Court to review a Tenth Circuit decision overturning the Secretary's reading of an 1867 agreement by which the Delaware Tribe of Indians was absorbed into the Cherokee Nation, and its members thereafter became Cherokee citizens.

Because the Tenth Circuit's decision exclusively involves matters peculiar to that unique 1867 agreement, concerns only the Cherokee Nation and some of its citizens, and is consistent with all decisions of this Court (as well as of the D.C. Circuit and the former Court of Claims) interpreting that agreement over the course of 112 years, the petition for a writ of certiorari should be denied.

Petitioner strains to invent a basis for review where none exists. Petitioner's characterization cannot change the basic fact, both recognized and conceded below (*e.g.* Pet. 6a, 6a n.2), that this case turns solely upon the proper meaning of a

sui generis 1867 agreement between only two parties—a "contract," as this Court repeatedly noted in *Cherokee Nation v. Journeycake*, 155 U.S. 196, 212, 215, 216 (1894)—and, therefore, those are the only parties whose rights possibly can be affected by the court of appeals' decision. Nor can petitioner's mis-characterization of prior decisions of this Court and of the lower courts alter the immutable fact that "*every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the [Secretary's] reading of the [1867] agreement." Pet. 12a, citing six decisions including *Journeycake*, *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), and the D.C. Circuit's earlier decision in this case prior to its transfer to Oklahoma, *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997) (*infra* 1a-26a). Indeed, far from supporting a case for review, the substantively identical decisions of two Circuit courts in this very case on precisely the same issues—first the D.C. Circuit (where petitioner participated fully) and now the Tenth Circuit—militates heavily against allocating this Court's scarce resources here. Petitioners have not just had their day in court, they have had it twice.

Petitioner's argument for review is equally insubstantial when it asserts a claimed inconsistency between the judgment below and this Court's decision in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). Here again the Tenth and D.C. Circuits both rejected that very contention, *see* Pet. 23a-24a; *infra* 24a, explaining with care that *Weeks* involved strictly the pursuit of pre-1867 breach of treaty claims, not the proper interpretation of the 1867 Agreement. Even the Secretary long ago rejected petitioner's position on *Weeks*, which helps explain why the Secretary never relied on *Weeks* as a basis for declaring petitioner to be a federally recognized tribe. Read fairly, and as the landmark COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (1982) accurately observes, *Weeks* concerns but a classic example of an Indian Tribe that has

long ago voluntarily relinquished its own sovereignty and separate recognition, but that retains the continuing right to vindicate ancient "tribal" claims under treaties predating that relinquishment. Pet. 23a-24a (citing COHEN at 12 & 12 n.64). *See also infra* 23a-24a (also citing COHEN). Thus, even if this case involved more than the Cherokee Nation and some of its citizens (and it does not), there exists no conflict between the Tenth and D.C. Circuit's decisions and any decision of this Court.

Petitioner's newly-minted "disastrous consequences" argument as a reason for review (Pet. 21) is both improper and disingenuous. It is improper because it seeks to inject into this agency review action a non-record, self-serving affidavit that was first created only when petitioner applied unsuccessfully to this Court for a stay of the Tenth Circuit's mandate. Pet. 21 n.8. It is disingenuous because it runs directly against a finding, made upon petitioner's own representation, that "[a]ll persons eligible for membership in the Delaware Tribe of Indians are also eligible for membership in the Cherokee Nation of Oklahoma."[1] Each of petitioner's members thus enjoys (or has the right to enjoy) all privileges and immunities of Cherokee citizenship, as expressly provided for under the 1867 Agreement (Pet. 95a) and the Cherokee Nation Constitution (AR 7-1141).[2]

---

[1] *Appeal of Delaware Tribe of Indians*, IBIA No. 02-65-A, ALJ Recommended Decision, at 11 (Finding 20) (July 26, 2002), *at* (http://www.ibiadecisions.com/lsda/isdacases/20020726-0265a.PDF), *accepted and declared final* by Order Notifying Parties of Finality of Recommended Decision (Int. Bd. Indian App. Sept. 24, 2002).

[2] As used herein, "AR" refers to the Administrative Record filed in the district court, "10th Cir. APP" refers to the Appellant's Appendix (excerpts of the Record), "10th Cir. ADD" refers to the Addendum to the Appellant's Opening Brief, "10th Cir. SUPPADD" refers to the Addendum to the Appellant's Reply Brief, and "10th Cir. 2dSUPPADD" refers to the Addendum to the Appellant's Supplemental Brief.

Finally, there is no substance to petitioner's argument that the Tenth Circuit's decision somehow jeopardizes the recognition of other Indian tribes. The Tenth Circuit's alternative ruling on this issue was expressly based upon the fact that "[t]he [Secretary] *used a procedure heretofore unknown to the law—'retract and declare'*—to purportedly re-recognize the Delawares." Pet. 25a (emphasis added). A ruling striking down an unprecedented and extreme departure from settled procedure certainly does not jeopardize the status of other Tribes recognized through less irregular means.

STATEMENT OF THE CASE

1a. The facts as related by the Tenth and D.C. Circuits are undisputed. After the Civil War, the Delaware Tribe of Indians (which in 1829 had been forced to relocate to Kansas) faced increasing pressure from the United States and white settlers to move once again. Pet. 7a; *infra* 2a. The United States then entered into a treaty with the Delawares under which their land in Kansas would be sold. *Treaty with the Delawares*, July 4, 1866, 14 Stat. 793. Article 3 of that Treaty granted all Delaware Indians "an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States." *Id.* (The Delawares who elected under Article 3 to sever all relations with any Indian Tribe are referred to herein as the "Kansas Delawares.") Alternatively, in Article 4 the United States promised to sell to those Delawares who instead wished to move south, certain lands in what was then "Indian country" (now Oklahoma) that either had been ceded to the Government by other Indian tribes or "which may be ceded by the Cherokees . . . , to be selected by the Delawares in one body in as compact a form as practicable." *Id.*; Pet 77a.

Later in 1866, the United States entered into a treaty with the Cherokee Nation. *Treaty with the Cherokee*, July 19, 1866, 14 Stat. 799. Article 15 of the Cherokee Treaty provided two means by which non-Cherokees might settle

upon certain Cherokee lands, what the court of appeals called: (1) "an 'incorporation option,'" Pet. 8a (or, as this Court in *Journeycake* put it, an "absorption" option, 155 U.S. at 204), and (2) a "'preservation option,'" Pet. 8a. As to the "incorporation"-"absorption" option, Article 15 (together with a generic introduction) provided:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: *Should any such tribe or band of Indians settling in said country abandon their tribal organization*, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in Cherokee country, *they shall be incorporated into and ever after remain a part of the Cherokee Nation*, on equal terms in every respect with native citizens.

Pet. 78a-79a (emphasis added). Alternatively under the "preservation option," settling tribes wishing to "preserve their tribal organizations, and to maintain their tribal laws, customs and usages" were required to make a population-based payment and to purchase "a district of country set off for their use by metes and bounds." Pet. 79a.[3]

---

[3] As the Tenth Circuit noted (Pet. 9a), Option 2 provided in full:

> "And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have *a district of country set off for their use by metes and bounds* equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and

Thus, while the 1866 Treaty permitted the Cherokee Nation and a settling tribe some flexibility in setting the terms of their relationship, it offered only two basic alternatives, either of which "had to be 'consistent' with one of the [two] options" (Pet. 18a): Option 1, incorporation and absorption into the Cherokee Nation and the permanent loss of separate tribal political identity, or Option 2, purchase of a distinct body of land for the settling tribe and continued separate political existence.

b. On April 8, 1867, the Cherokee Nation and the Delaware Tribe entered into Articles of Agreement under which the Delawares[4] agreed to settle in Cherokee country. Pet. 91a-96a. The Agreement recited that it was authorized "'pursuant to Article 15 of the 1866 Cherokee Treaty'" (Pet. 10a, quoting same), and not Article 4 of the Delaware Treaty.[5] The 1867 Agreement also three times recited that

---

> "[1] shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States....
>
> "[2] And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees."

[4] In this Brief the term "Delawares" or "Cherokee-Delawares" refers to those Delawares who moved to Cherokee country. It does not include the "Kansas Delawares" or other Delawares who settled elsewhere in Oklahoma.

[5] The 1867 Agreement mentions Article 4 of the Delaware Treaty (which contemplated the purchase "in one body in as compact a form as practicable" of lands ceded by the Cherokees), but explains that this Delaware Treaty provision could not be implemented according to its terms because "no such cession of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided as hereinbefore

the Delawares were thereby "consolidat[ed]" or "incorporated" into the Cherokee Nation (Pet. 92a, 93a, 95a), matching Article 15's incorporation-absorption option. It then concluded:

> "On fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, *shall become members of the Cherokee Nation*, with the same rights and immunities, and the same participation (and no other,) in the national funds, *as native Cherokees*, save as hereinbefore provided. And the children hereafter born of *such Delawares so incorporated* into the Cherokee Nation, shall *in all respects be regarded as native Cherokees.*"

Pet. 11a, quoting 1867 Agreement (Pet. 95a). This closing paragraph perfectly matched Article 15's provision that the members of a tribe choosing to "abandon [its] tribal organization" would become "incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens."[6] Pet. 78a-79a. Just as significantly, and unlike Article 15's preservation option, the 1867 Agreement did not provide for the Delawares to acquire "a district of country set off for their use by metes and bounds" (Pet. 79a), but provided for the purchase by

---

mentioned, under which friendly Indians might be settled upon their [*i.e.*, Cherokee] lands." Pet. 91a-92a.

[6] The 1867 Agreement's language regarding one of the payments the Delawares would make is nearly identical to Article 15's like provision under the incorporation-absorption option. *Compare* Pet. 93a-94a ("a sum of money, which shall sustain the same proportion to the existing Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation") *with* Pet. 79a ("a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country").

individual Delawares of temporary 160-acre life estates anywhere throughout Cherokee country. Pet. 92a-93a.[7]

As required by Article 15, the 1867 Agreement was approved by the President. In transmitting the Agreement to the President, Interior Secretary Browning described it as "providing for *uniting the two tribes, as contemplated by the Cherokee Treaty of July 19, 1866* . . . ," a result only possible under Article 15's incorporation-absorption option. 10th Cir. APP 296 (emphasis added) (Presidential approval omitted from petitioner's appendix). *See also* Pet. 22a n.6 and 10th Cir. APP 298-319 (statements by Delaware leaders explaining the Agreement provided for "merging" the formerly separate tribes into one).

c. In the years following execution of the 1867 Agreement disputes arose between the Cherokee Nation and the settled Delawares. One dispute involved the rights of the Cherokee-Delawares (and also the Cherokee-Shawnees, descendants of another tribe incorporated into the Cherokee Nation) to share as Cherokee citizens in the proceeds of certain "Cherokee lands west of the Arkansas River." Act of Oct. 19, 1888, ch. 1211, 25 Stat. 608. In this dispute, "the Cherokee legislature . . . over the veto of the [Cherokee] principal chief" directed that the land proceeds be paid only "to the citizens of the Cherokee Nation by blood," thus excluding the Delawares and Shawnees. *Id.* In 1888 Congress responded by directing that appropriate sums from the Treasury owing to the Cherokees be redirected to the Delawares and Shawnees. *Id.* at 609. In so enforcing the 1867 Agreement, Congress recited that under Article 15 of the Cherokee Treaty "the Indians thus settled were . . . to be *incorporated into and ever after remain*

---

[7] The additional purchase of these temporary life estates exceeded the minimum requirements of the incorporation-absorption option, but was not inconsistent with it. In contrast, incorporation and the acquisition of scattered life estates was plainly *in*consistent with the preservation option.

a part of the Cherokee Nation, on equal terms in every respect with native [Cherokee] citizens"—a verbatim reference to Article 15's incorporation-absorption option. *Id.* at 608 (emphasis added). The 1888 Act also recited that the Cherokees had entered into two agreements with the Delawares and the Shawnees "under the provision of the aforesaid fifteenth article," *id.*, adding that the Delawares and Shawnees had thereby each been "*incorporated into the Cherokee Nation*," *id.* at 609 (emphasis added), another verbatim reference to that article's incorporation-absorption option.[8]

d. Notwithstanding Congress' corrective action in 1888, disputes between the Delawares and the Cherokee Nation continued, next over the "proceeds from the rental of certain Cherokee land." *Infra* 5a. This time Congress authorized the Delawares (like the Shawnee) to bring suit "to hear and determine what are the just rights . . . of the . . . Delaware Indians, who are settled and *incorporated into the Cherokee Nation* . . . under the provisions of article fifteen of the [Cherokee Treaty] . . . and articles of agreement . . . made with the Delaware Indians April [8, 1867]," yet another reference to Article 15's incorporation-absorption option. Act of Oct. 1, 1890, ch. 1249, 26 Stat. 636 (emphasis added).

Delaware Chief Charles Journeycake, in a representative capacity on behalf of the Delawares, then sued the Cherokee Nation and the United States to establish the Delawares' rights as full Cherokee citizens. Pet. 14a n.4. The Complaint averred that the Delawares had by the 1867 Agreement "abandoned their separate tribal organization" (10th Cir. 2dSUPPADD 8), a key point on which the Court of Claims

---

[8] The parties agree that the Shawnee Tribe was incorporated into the Cherokee Nation under Option 1 of the Cherokee 1866 Treaty and thereby surrendered its independent sovereignty. Pet. 18.

agreed in sustaining the Delawares' rights as full Cherokee citizens:

> The agreement of 1867, which we have been considering as a mere contract, was something more than a deed of bargain and sale, viz, a treaty. . . . *By this treaty two independent bodies politic united and became one, the lesser, according to its terms, being merged in the greater.* The compact regulated and guaranteed the individual and political rights of those who *surrendered their independent corporate existence* and became members of the Cherokee nationality.

Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 311 (1893) (emphasis added). *See also* Pet. 12a (quoting same).

In affirming the Court of Claims in all respects, this Court focused on Article 15's two options:

> One in which the Indians settled should *abandon their tribal organization, in which case, as expressed, they were to 'be incorporated into, and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native citizens.'* The other was where removal of the tribe to the Cherokee country should involve no abandonment of the tribal organization, in which case a distinct territory was to be set off, by metes and bounds, to the tribe removed. *The one contemplated an absorption of individual Indians into the Cherokee Nation; the other, a mere location of a tribe within the limits of the Cherokee Reservation.*

Journeycake, 155 U.S. at 204 (emphasis added). Having so characterized the two options, this Court concluded that the 1867 Agreement unambiguously implemented the first option, reflecting "*the expressed thought of a consolidation of these Delawares with, and absorption of them into, the Cherokee Nation as individual members thereof.*" *Id.* at 213 (emphasis added).

Far from skirting the issue, *e.g.*, Pet. 8, 14, this Court expressly considered and held that the Delawares did not come into Cherokee territory under the "preservation" option, explaining that "[t]here is no provision for the setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe," *Journeycake*, 155 U.S. at 205-206, and adding later that "[i]n other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee Reservation." *Id.* at 213 (emphasis added). This Court could not have spoken more clearly to the very point the petitioner now seeks to relitigate a century later.[9]

e. When conflicts over the 1867 Agreement persisted, Congress once again authorized the Court of Claims to determine the nature of the parties' rights—this time, the nature of the Delawares' occupancy rights. Act of June 28, 1898, ch. 517, sec. 25, 30 Stat. 495, 504. For this lawsuit the Delawares shifted to arguing they had acquired rights superior to those of other Cherokee citizens, including permanent land rights that no other citizen enjoyed, based on the underlying proposition that they had come into Cherokee country under the preservation option—the precise opposite

---

[9] To continue insisting that this issue was not decided is untenable. So, too, is it untenable to continue arguing that this Court did not consider the meaning of the Delawares' second payment under the 1867 Agreement: not once, but *twice*, this Court in *Journeycake* explained that the second payment purchased temporary life estates anywhere on the Reservation, guaranteed minimum future allotments, and purchased an undivided interest in the balance of the Cherokee Nation's lands. 155 U.S. at 212-13, 215. The Court's central holding that the Delawares had a right to share in the proceeds earned on Cherokee lands hinged *directly* on that second payment, with the Court explaining at length that one dollar per acre might have been far too much for mere temporary life estates, but not for the considerably larger interest the Delawares thereby acquired in other Cherokee lands. *Id.* at 215. For the Tenth Circuit's comparable analysis, *see* Pet. 15a, 21a.

of their contention in *Journeycake*. But the Court of Claims disagreed, concluding that the settling Delawares acquired a mere right of occupancy of individual parcels for their own lifetimes, just as other Cherokee citizens possessed, and not an inheritable right that no Cherokee citizen enjoyed. *Delaware Indians v. Cherokee Nation*, 38 Ct. Cl. 234, 247-53 (1903). The court specifically rejected the notion that the 1867 Agreement brought the Delawares into Cherokee territory under the preservation option (*id.* 247-48):

> The [Cherokee] treaty of 1866 provided in substance that in case any tribe settling in the country should decide to preserve their tribal organization and maintain their laws and customs, they should have a district of country set off by metes and bounds equal to the 160 acres of land for each man, woman, and child of said tribe. But no such provision is found in the agreement or treaty of 1867.

Once again this Court affirmed, agreeing "the Delawares were made a part of the Cherokee Nation," and they became "a component part upon equal terms with other citizens." *Delaware Indians*, 193 U.S. at 144. The Court expressly rejected "[t]he claim . . . that the contract of 1867 secured . . . to the Delawares *as a tribe*, the 157,000 acres of land," *id.* at 134 (emphasis added). Relying on *Journeycake*, the Court explained that no tribal rights survived the Delawares' entry on to Cherokee lands:

> In [*Journeycake*] it was held that under the agreement *the registered Delawares were incorporated into the Cherokee Nation*, and as members and citizens thereof were entitled to participate in the proceeds of the sale of a portion of the Cherokee lands upon equal terms with native Cherokee citizens.
>
> . . .
>
> It was held in the *Journeycake Case*, to be the purpose of this agreement *to incorporate the registered Delawares*

> *into the Cherokee Nation*, with full participation in the political and property rights of citizens of that nation. As a part of the general agreement, provision is made for rights in certain lands as a home for the Delawares who are to remove from their Kansas lands to the Indian territory. These lands are to pass to registered Delawares and they are to have the privilege of selecting them from unoccupied lands east of the line 96 degrees west longitude. *This right is conferred not upon the Delaware Nation, but upon certain registered Delawares who are to be incorporated into the Cherokee Nation.*

Id. at 134-35 (emphasis added). In so holding, this Court unambiguously rejected the Delawares' contention, resurrected here, that they came into Cherokee country under the preservation option. On this point there was no quibbling, for the Court made plain that there is no "latent ambiguity in the terms of the contract." *Id.* at 141.[10]

2a. Throughout the late 19th Century and for most of the 20th Century, the Secretary and the Department continued to view the Delawares as having merged with the Cherokee Nation for all purposes, save for the pursuit of ancient breach of treaty claims pre-dating the 1867 Agreement (and the expenditure of awards secured upon such ancient claims). An early example is found in *Delaware Indians in Cherokee Nation–Allotment*, 25 Pub. Lands Dec. 297 (1897), where the

---

[10] As the Tenth Circuit summarized (Pet. 17a, citations omitted),

> The Delawares nevertheless insisted the 1867 Agreement "should not be literally enforced in view of the understanding of the parties[]" and sought to introduce parol evidence. The Court, however, found the contract unambiguous and rejected the Delawares' resort to parol evidence. The Court explained "no room" existed in the case to "depart[ ] from the familiar rules of law protecting written agreements from the uncertainties of parol testimony." "In light of the circumstances and the language used in the writing, its construction [was] not rendered difficult because of latent ambiguities."

Department's Attorney General, with the Secretary's approval, anticipated the outcome in this Court in *Delaware Indians* by opining that the 1867 Agreement "was . . . a compact for the consolidation of two separate and distinct bodies politic by which *they became united in one*. By its terms the Delawares, or that portion of that tribe which saw fit to accept the agreement, *were merged in and became a component part of the body politic of the Cherokee Nation*." *Id.* at 302 (emphasis added); 10th Cir. SUPPADD 8. Later opinions are to a similar effect.[11]

b. Over the years the Delawares continued to pursue historic claims against the Government arising out of treaties pre-dating their 1867 merger into the Cherokee Nation. For these purposes the Delawares would establish various tribal committees which served to present their claims against the Government in the name of the historic "Delaware Tribe of Indians" and, if successful, to later administer judgment funds awarded on such claims as the lineal descendants of that historic entity. *E.g.*, Act of February 27, 1925, 43 Stat. 812, *as amended by* Act of March 3, 1927, Pub. L. 69-717, ch. 314, 44 Stat. 1358. One such claim, involving an 1854 land transaction, was prosecuted under the Indian Claims Commission Act of August 13, 1946, Pub. L. 79-726, ch. 959, 60 Stat. 1049, as amended, *formerly codified at* 25 U.S.C. §§ 70-70v-3 ("ICCA"), and resulted in a substantial recovery *Absentee Delaware Tribe of Oklahoma, et al. v. United States*, 21 Ind. Cl. Comm. 344, 370 (1969). (The ICCA authorized suits against the United States not only by

---

[11] *See e.g.*, 10th Cir. APP 403 (1952 Solicitor's Opinion); APP 571 (1982 Solicitor's Opinion); APP 296 (1867 Message to the President); APP 329, 330 (1886 statements of President Cleveland and Secretary Lamar); APP 486 (1978 BIA correspondence); APP 499 (1979 BIA correspondence); APP 516 (1980 House Report restating BIA position); AR 4-0282 (1981 BIA opinion); APP 535-37, 592-98 (Secretary's 1981 & 1983 briefs); and APP 624 (1994 BIA correspondence).

tribes and bands, but also by any "other identifiable group of American Indians." 60 Stat. at 1050, § 2, *formerly codified at* 25 U.S.C. § 70a.)

The proper distribution of that award gave rise to yet another Delaware case that ultimately made its way to this Court, albeit one in which the Cherokee Nation was not a party. In *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), lineal descendants of the "Kansas Delawares"—those who in a legal sense elected to cease being Indians under Article 3 of the 1866 Delaware Treaty (*supra* 5)—challenged Congress' limitation on the distribution of Delaware judgment funds exclusively to the Delawares who had moved to Cherokee country (and to the Absentee Delawares who had moved elsewhere in Oklahoma). Before addressing Congress' distribution plan, this Court (without supporting citation) observed in passing that the Delawares "are today a federally recognized tribe." *Weeks*, 430 U.S. at 77. At the same time, however, the Court recognized that Congress hitherto had treated the Delawares only as "a distinct entity" in the historic pre-1867 treaty claims setting, and it acknowledged that "[t]he District Court made no finding as to the Cherokee Delawares' status as a recognized tribe." *Id.* at 77 n.8. The *Weeks* decision is discussed at greater length *infra* 25-28, because it is the centerpiece of the petition.

3a. During the 1970s the Interior Department came under considerable criticism over its *ad hoc* non-regulatory process for according official political recognition to tribal governments. *E.g.*, American Indian Policy Review Commission, FINAL REPORT at 477-79 (GPO 1977). (The Commission was established by Pub. L. 93-580, 88 Stat. 1910 (1975), as amended.) In response, the Department in 1978 standardized its procedures for according such recognition by adopting formal tribal acknowledgment regulations. 25 C.F.R. pt. 54 (1979), *redesignated* 25 C.F.R. pt. 83. Proceeding under these regulations, on January 31, 1979, the Department issued

its first comprehensive and official list of "Indian tribal entities that have a government-to-government relationship with the United States." 44 Fed. Reg. 7,235 (Feb. 6, 1979). Like most available pre-regulation lists, the new list included the Cherokee Nation but not the Delawares. *Id.*[12]

The Bureau of Indian Affairs (BIA) subsequently issued seven listings of recognized tribes, all including the Cherokee Nation and all omitting the Delawares. *See* 46 Fed. Reg. 35,360 (July 8, 1981); 47 Fed. Reg. 53,130 (Nov. 24, 1982); 48 Fed. Reg. 56,862 (Dec. 23, 1983); 50 Fed. Reg. 6,055 (Feb. 13, 1985); 53 Fed. Reg. 52,829 (Dec. 29, 1988); 58 Fed. Reg. 54,364 (Oct. 21, 1993); and 60 Fed. Reg. 9,250 (Feb. 16, 1995). As the Tenth Circuit correctly noted (and as petitioner oddly contests, Pet. 8-9), "[t]he Delawares had never been on the list prior to this lawsuit," Pet. 2a (referring to the list issued under 25 C.F.R. § 83.5(a)).

From the promulgation of its Part 83 regulations in 1978 until 1996, the Department consistently took action on the basis that the Delawares were *not* a separately recognized tribe. 10th Cir. APP 486, 490, 491, 496, 497, 499, 501, 505, 507, 511, 523, 526, 571, 617, 618, 621, 624, 629. On February 26, 1979, for example, the BIA's Washington office wrote Henry Secondine, Chairman of the Delaware Business Committee, about "the relationship between the Delawares and the Cherokee Nation" (APP 490) explaining:

> It is clear that by the 1867 Agreement, certain Delaware Indians . . . became a part of the Cherokee Nation. . . .

---

[12] According to the record, three out of four of the agency's unofficial pre-1979 lists in the previous decade excluded the Delawares. *See* 10th Cir. APP 435 (1973); APP 451 (1972); APP 256 n.12 (discussing a 1969 list). A fourth unofficial list included the "Cherokee-Delaware Business Committee," APP 470 (1978), although its significance is muddied by the fact that many of the unofficial pre-1979 lists expressly included Indian groups "recognized only for purposes of settling claims against the U.S. Government." APP 436, 437.

> [W]e consider the Cherokee Delawares to be . . . within the Cherokee Nation. The Cherokee Delawares are free to take necessary action to deal with their judgment awards and to preserve their Delaware identity. For governmental purposes, however, they must look to the Cherokee Nation of which they are an integral part.

In May 1979, an Acting Deputy Commissioner of the BIA wrote another letter to Mr. Secondine, notifying him that the BIA was withdrawing its prior approval of the Delaware Business Committee's by-laws (under development to administer a treaty claims judgment) because it was "not capable of adequately protecting the interests of the Cherokee Delaware people" (as was required in an appropriations law providing for the payment of the Delaware judgment). APP 499. The letter summarized the BIA's position on the Delawares' status, stating that its prior dealings with the Business Committee with respect to pre-1867 treaty claims had led to "misunderstandings" by some persons that those dealings "established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation; such is not the case." *Id.* The May 1979 letter has since taken on added significance because its 1996 "re-traction" by the Assistant Secretary became the "heretofore unknown in the law" device the Department employed to extend separate recognition to the Delawares. Pet. 25a; *infra* 17a.

b. Notwithstanding the Department's prior settled position, "[t]he Delawares began a quest for Federal recognition in 1992." Pet. 2a. They filed a letter of intent to petition the Department for federal acknowledgment as a tribe under 25 C.F.R. pt. 83. *Id.* The Department initially refused to consider the petition, explaining the "Delawares have not existed as an independent political identity since 1867, and have been absorbed into the Cherokee Nation of Oklahoma for general governmental purposes since that time." Pet. 2a. But the Department subsequently clarified the Delawares'

right to file a formal petition if it so chose Pet. 2a-3a. Then, instead of following through with a petition, the Delawares abruptly bypassed the process altogether by simply asking the Department to "reconsider and retract" the agency's position not to deal with the Delawares as a separate federally recognized tribe. Pet. 3a. "The agency [then] conducted a 'legal review' of the situation at the Delawares' behest" (*id.*), preparing a new legal opinion which concluded that in 1867 the Delawares actually had preserved their independent sovereignty, purportedly having acted under the "preservation option" rather than the "incorporation"-"absorption" option of the 1866 Cherokee Treaty. All this the Secretary's "detailed analysis" reasoned in one short footnote.[13] After 30 days notice of that legal opinion, the Secretary then issued a September 1996 decision retracting the May 1979 letter (*supra* 18) and declaring on that basis that the Delawares never stopped being a federally recognized tribe. *Id.* (Contrary to the Petition at 2, there never was any "hearing" on the matter.)

4a. In October 1996 the Cherokee Nation brought suit in the District of Columbia under 5 U.S.C. §§ 701-706 of the Administrative Procedure Act to overturn the Secretary's recognition decision as arbitrary, capricious and contrary to law. The district court granted the Secretary's motion to dismiss on indispensable party grounds, holding the Delawares could not be joined due to tribal sovereign immunity. 944 F. Supp. 974, 986. On appeal the D.C. Circuit reversed, explaining in a lengthy and carefully considered opinion that: (1) the Secretary's decision to accord recognition to the Delawares was not entitled to deference on the sovereign immunity issue because "the Department did not follow the

---

[13] "The agency's decision to extend recognition to the Delawares rested on an alleged 'comprehensive legal analysis' that devoted three sentences, in a footnote, to the Supreme Court's decisions interpreting the 1866 Cherokee Treaty and 1867 Agreement." Pet. 25a.

Part 83 regulations, but recognized the Delawares through the procedural device of retracting the May 24, 1979, non-recognition letter. An agency is required to follow its own regulations" (*infra* 17a, citing, *inter alia*, *Service v. Dulles*, 354 U.S. 363, 388 (1957); (2) deference was also not due where the issue was purely a question of law involving the meaning of the 1867 Agreement, *Journeycake* and *Delaware Indians* (Pet. 17a-18a); (3) deference could not trump the presumption of reviewability (*id.* 18a, citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)); (4) the Delawares in 1867 abandoned their separate sovereignty under Option 1 of the Cherokee Treaty, reasoning that "[t]he use of the term 'incorporated' in the 1867 Agreement is sufficiently unambiguous to constitute an express relinquishment of the Delawares' status as a separate sovereign" (Pet. 22a), adding that "[t]he plain meaning of this language is that the two tribes were to be consolidated into a single unit" (*id.* 23a); and (5) "*Weeks* cannot be so broadly read as to resolve the issue in the instant appeal. Nothing in the Court's opinion suggests that it was revisiting its earlier conclusion in *Delaware Indians* and *Journeycake* that the Delawares had been 'incorporated' into the Cherokee Nation" (*id.* 24a). Through a subsequently added footnote the Court limited its opinion to the indispensable party issue. *Id.* 26a n.15.

b. Subsequent to remand the action was transferred to the Northern District of Oklahoma (Pet. 4a) where the district court relied on *Weeks* and on the claims statute there at issue to conclude that the Secretary did not violate the APA (Pet. 56a). Significantly, the court omitted any substantive discussion of the 1867 Agreement, *Journeycake* or *Delaware Indians*.

c. On appeal the Tenth Circuit reversed, detailing with even greater care the analysis undertaken by the D.C. Circuit. The Court took note that "the agency's recognition of the Delawares was based solely on its *analysis of the treaties and*

agreements entered into by the Cherokee Nation and Delawares in the 1860s" (Pet. 6a), and therefore the agency's decision would have to stand or fall on that analysis. Since the Secretary's "'review' of its administrative practice over the next century was simply to confirm the Delawares' status" as being what the Secretary already had concluded it to be under the 1867 Agreement, the case presented a pure question of law on issues where Congress did not confer on the Secretary any discretion. Pet. 6a-7a, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), *superceded by* 29 U.S.C. § 1854.[14]

Next, the court of appeals reviewed all the extant case law stretching from the *Journeycake* opinions to the D.C. Circuit's opinion here and concluded that in all these cases the Delawares had been conclusively found to have abandoned their separate sovereignty as of 1867 and been fully absorbed into the Cherokee Nation. Pet. 12a ("*every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the DOI's reading of the agreement"), 17a-18a ("[b]ased on the foregoing, the [Secretary's] conclusion the Delawares preserved their tribal identity under the 1866 Cherokee Treaty and 1867 Agreement is *clearly* contrary to Supreme Court precedent"), 18a ("'An agency . . . *must* conform its conduct to a decision of the Supreme Court in all future cases, even if the agency believes that the Court was wrong'" (citation omitted)), 25a ("The [Secretary's] recog-

---

[14] Since the Secretary did not rely on post-1867 events to conclude that the Delawares preserved their separate sovereignty under the 1867 agreement, the court of appeals limited its review to what the Secretary had decided. Pet. 6a n.2, citing *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) and *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Thus, the court of appeals expressly refrained from passing upon most of the arguments the petitioner now advances, reserving petitioner's right to raise them in any future agency proceedings.

nition of the Delawares in this case was contrary to the United States Supreme Court's decisions in *Journeycake* and *Delaware Indians*").

Even then, the court of appeals indulged the petitioner by reviewing the pertinent treaties and the 1867 Agreement *ab initio* (as did the D.C. Circuit), only to confirm once again that "[t]he unambiguous language of the 1867 Agreement, including the provisions for the Delawares' two payments, is consistent with the Delawares' selection of the incorporation option of Article 15." Pet. 18a. *See also* Pet. 19a ("the language of the agreement and the nature of its execution are inconsistent with Article 15's preservation option"), 19a ("the agreement's language is unambiguous"), 20a ("[a]bsolutely nothing in the administrative record supports the Delawares' theory" that they "selected and settled upon a ten-by-thirty tract of land in the Cherokee Nation"), 21a ("the [Secretary's] theory that the Delawares' two payments to the Cherokee Nation evidences 'preservation' rather than 'incorporation' is misguided"). After examining the petitioner's and the Secretary's additional arguments in favor of considering improper parol evidence, the court of appeals explained that "*assuming* for the moment the agreement is ambiguous (which it is not) and the Supreme Court had not held it unambiguous (which it did), the Delawares would still not be in any better position. The parties' contemporaneous actions evidenced their belief the Delawares incorporated into the Cherokee Nation." Pet. 22a.

Finally, the court of appeals rejected petitioner's "misplaced" reliance on this Court's decision in *Weeks*. Pet. 23a. After noting the distinction between a modern day entity pursuing an ancient "tribal" claim and a genuine modern-day recognized tribe (Pet. 23a-24a, quoting COHEN at 12 (citing the Delawares)), the court concluded that "[a]t most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes." Pet. 24a. As for the argument that

subsequent actions restored the Delawares' sovereignty after 1867, be they drawn from the statute at issue in *Weeks* or elsewhere, the court was careful to note again that since the Secretary had not relied upon such subsequent actions for her recognition analysis, the court likewise could not consider such actions, much less sustain the Secretary's decision as if it were based upon them. *Id.* ("[w]hether the Delawares were reconstituted–be it through Act of Congress or administrative practice–sometime after 1867 is not before us"). Indeed, the Secretary–who has not petitioned this Court–"conceded" that the basis for the Secretary's decision was strictly the 1867 Agreement and the related treaties. Pet. 6a n.2.

In its concluding paragraph the court of appeals further faulted the Secretary for failing to follow the agency's own regulatory procedures, Pet. 25a, criticizing the agency for using "a procedure heretofore unknown to the law—'retract and declare'—to purportedly re-recognize the Delawares. In so doing, the [Secretary's] actions were arbitrary and capricious."

Judge Seymour concurred in the judgment, "agree[ing] with my colleagues that the Supreme Court's decisions in [*Journeycake* and *Delaware Indians*] control the outcome of this controversy," and adding that "after a very careful and particular examination of the Supreme Court's decisions in *Journeycake* and *Delaware Indians* in conjunction with an equally careful examination of the treaties and agreements they interpret, . . . one must conclude this controversy should be resolved in favor of the Cherokee Nation." Pet. 26a.

REASONS FOR DENYING THE PETITION

1. As the foregoing discussion makes plain, this case involves the unique relationship between the Cherokee Nation and the Delawares, as reflected in their 1867 Agreement read against the backdrop of their respective 1866 treaties. The agency action below was based solely upon a

legal opinion which (1) analyzed those historic documents as preserving separate Delaware sovereignty after 1867, rather than effecting its abandonment; and (2) construed this Court's *Journeycake* and *Delaware Indians* decisions in three sentences to have somehow failed to address the issue.

That is what the legal opinion said, that is what the Secretary conceded, and that is the core question the court of appeals addressed. Consequently, and as the Tenth Circuit noted, all the petitioner's contentions about subsequent events are for another day and another proceeding. As this Court's decisions in *FPC v. Texaco Inc.* and *Motor Vehicle Mfrs.* teach, an agency action must stand or fall "'on the same basis articulated . . . by the agency itself,'" *Texaco*, 417 U.S. at 397 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)), and therefore "an agency's action must be upheld if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs.*, 463 U.S. at 50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Courts cannot speculate about additional reasons that might sustain an otherwise plainly illegal action. Surely petitioner cannot be asking this Court to cast aside that time-honored principle of administrative law—although that is precisely what the petition effectively seeks.

The Tenth Circuit's appropriately narrow scope of review underscores the fact that this case involves only matters peculiar to the 1867 Cherokee-Delaware Agreement, and it concerns only the relationship between the Cherokee Nation and some of its citizens. Such a case does not warrant further review in this Court, all the more so given its absolute fealty to 112 years of precedent interpreting that Agreement, including this Court's express and unambiguous determinations in *Journeycake* and *Delaware Indians* that the

Delawares came to Cherokee country under the "absorption"—"incorporation" option.[15]

2. The petitioner's attempt to make a case for review based upon *Weeks* is untenable. First, the Secretary's decision below never rested upon *Weeks* (or anything else after 1867), so it can hardly now form a proper basis for sustaining it. *Supra* 23-24. ("Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice–sometime after 1867 is not before us." Pet. 24a.)[16] Second,

---

[15] The court of appeals did not err in declining to defer to the Secretary's erroneous reading of *Jouneycake, Delaware Indians* and the 1867 Agreement. Pet. 21-25. An agency's decision on a point of law is entitled to no deference when it is "clearly wrong." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), discussed at Pet. 5a-6a; *infra* 17a-18a ("[i]f the Department acted contrary to law, the Final Decision would be owed no deference"). Any case for deference is further weakened when account is taken of the Secretary's failure to follow settled procedure. Pet. 5a; *infra* 17a; *see also Miami Nation of Indians of Ind., Inc. v. United States Dep't of Interior*, 255 F.3d 342, 348 (7th Cir. 2001) (involving once-recognized Miami Nation and noting the Part 83 regulations have "canalize[d]" the agency's discretion by establishing "'legal'" criteria that are "obligatory"); *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (involving once-recognized Western Shoshone Tribe and noting that the Part 83 regulations have "eclipsed" the formerly "ad hoc" process by which once-recognized tribes could secure federal recognition); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (involving once-recognized Gay Head Wapanoag and directing the group to the Part 83 procedures because "[t]he purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes"). Further, the Secretary's new interpretation of the 1867 Agreement sharply departs from her prior interpretations reaching back to the Secretary's 1867 transmittal of the Agreement to the President (*supra* 9) and her detailed 1897 legal opinion (*supra* 15). *See Watt v. Alaska*, 451 U.S. 259, 273 (1981), *discussed at* Pet. 6a.

[16] The agency's Final Decision does not mention *Weeks*. 10th Cir. APP 239-40. Similarly, the underlying legal opinion reached its conclusion strictly on "the weight of the administrative practice and analysis of the 1866 treaties and 1867 agreement," not on the basis of

nothing in *Weeks* even remotely hints that the Court there intended to undo a century of law, beginning with *Journeycake*, interpreting the 1867 Agreement as effecting a consolidation of the Delawares into the Cherokee Nation and thereby ending their separate sovereignty—indeed, the 1867 Agreement was not even at issue in *Weeks*. As the court of appeals correctly noted, "[t]he present case . . . turns on the [Secretary's] interpretation of the 1866 Cherokee Treaty and 1867 Agreement. We thus have a duty to follow *Journeycake* and *Delaware Indians* because they directly control our interpretation of the agreement." Pet. 24a.

Finally, at issue in *Weeks* was the constitutionality of a 1972 Act carrying out a claims award made under the ICCA in favor of an historic tribe, as a result of a suit brought by a modern "identifiable group of American Indians" (60 Stat. at 1050, § 2, *formerly codified at* 25 U.S.C. § 70a.[17] That 1972

Weeks. APP 266. This is perfectly understandable, given the Secretary in other litigation declared that *Weeks* did *not* overturn *Journeycake*, and did *not* constitute a recognition of the Delawares for anything other than the pursuit of ancient breach of pre-1867 treaty claims. APP 517-612.

[17] In reversing the Claims Commission's initial dismissal of the Delawares' claim (a decision which ultimately led to the judgment fund at issue in *Weeks*), the Court of Claims described the "Delawares who removed to the Cherokee territory" *not* as a tribe, but as merely having "maintained group identity" sufficient to prosecute a claim under section 2 of the ICCA. *Delaware Tribe of Indians v. United States*, 128 F. Supp. 391, 398 (Ct. Cl. 1955). Significantly, the 1972 Act providing for distribution of the Delaware judgment fund described the beneficiary as "the Delaware Tribe of Indians *in Docket 298*." 25 U.S.C. § 1291 (emphasis added). The "Delaware Tribe of Indians in Docket 298" was the same as the Delaware Tribe of Indians in Docket 27-A (*Absentee Delaware*, 21 Ind. Cl. Comm. at 345) which in turn was described by the Commission as being not a recognized tribe or band, but only as "members and citizens of the Cherokee Nation * * * who * * * maintained group identity." *Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 253, 260 (1952), *aff'd as to parties*, 128 F. Supp. 391, 398 (Ct. Cl. 1955) (same).

Act, like an earlier 1904 Delaware judgment fund statute discussed in *Weeks* (430 U.S. at 77 n.8, 86-87) made a distinction between (1) descendants of those Kansas Delawares who, under Article 3 of the Delaware 1866 Treaty, had voluntarily cut off all tribal relations of any nature whatsoever with any tribe and had chosen instead to become full U.S. citizens (and, in that legal sense only, non-Indians), and (2) descendants of those Oklahoma Delawares who under Article 4 remained "tribal" by incorporating into the Cherokee Nation or settling elsewhere in Oklahoma.

The Court's decision upholding the constitutionality of the 1972 Act was based entirely upon the 'non-Indian,' non-tribal legal status of the Kansas Delawares. As such, (1) they were not "an identifiable group of American Indians" (25 U.S.C. § 70a) empowered to pursue claims under the ICCA (430 U.S. at 85-86); (2) they had accordingly and historically been excluded from participation in earlier breach of treaty Delaware claims awards (*id.* at 86-87); and (3) due to that exclusion, Congress sought to avoid perceived "substantial problems it apprehended might attend a wider distribution" (*id.* at 87).

All to say that, contrary to petitioner's repeated insistence otherwise, nothing in the Court's ultimate conclusions turned on the unsupported introductory remark that the Delawares "are today a federally recognized tribe" (*id.* at 77). That point simply "was not relevant" to the issue presented, *infra* 24a, which required only that the Delawares be somehow tribally affiliated, *i.e.*, have legal "Indian" status. Indeed, lest one read more into the statement than is warranted, the Court noted immediately in footnote that Congress hitherto had treated the Delawares only as "a distinct entity," and that such action was in the claims setting, while also acknowledging that "[*t*]*he District Court made no finding as to the Cherokee Delawares' status as a recognized tribe.*" 430 U.S. at 77 n.8 (emphasis added). The only function of the Court's footnote

is to limit the statement in text to claims matters. Petitioner never explains what would have motivated the Court to make any broader and binding holding regarding the Delawares' recognized tribal status in the face of its irrelevancy and an empty record on the point. Of course, that is not what the Court did, and that is why the Tenth Circuit, like the D.C. Circuit, correctly reasoned that "[a]t most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes." Pet. 24a.[18] The absence of any genuine conflict between the Tenth and D.C. Circuits' opinions and *Weeks* further supports denial of the petition.

3. The claimed adverse impact upon petitioner's "members" does not provide a basis for review in this case. *Supra* 5. It is not just that the claim is premised on extra-record materials never before considered by the agency or by any court. *Id.* Nor is it just that the claim is plainly at odds with findings made elsewhere based upon the Delawares' own representations. *Id.* It is just plain wrong. Under the 1867 Agreement—

> all the members of the tribe, registered as above provided, *shall* become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as *native* Cherokees, save as hereinbefore provided.

---

[18] *See also* Pet. 23a ("The Court's dicta [in *Weeks*] . . . indicated Congress' distribution of a claims award to the "Delaware Tribe of Indians," was sufficient to recognize the Delawares as a tribe *for the limited purpose of the claims statute at issue in that case*") (citations omitted) (emphasis added); *infra* 24a (explaining, in part based upon the Secretary's acknowledgment at oral argument, APP 640, that "the Court simply summarized what it understood to be the government's position in that case"). Again, this is precisely how the Secretary viewed *Weeks* in subsequent years. *Supra* 15 n.11, 25 n.16. Such limited recognition of an Indian entity for claims purposes only is commonplace, with the Delawares a classic example. COHEN at 5-6 & n.20, 12 & n.64; 41 AM. JUR. 2D *Indians* § 6 nn.34 & 35 (2005); 42 C.J.S. *Indians* § 27 nn.91 & 92 (2005).

> And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

Pet. 95a (emphasis added). *See also* Cherokee Nation Const. art. III, § 1 (10th Cir. AR 7-1141) (defining Cherokee citizenship to include all Delaware descendants). Under these provisions the Delawares whom petitioner purports to represent are by law entitled to Cherokee citizenship, and to hold and retain such citizenship if they so choose. Requiring those people to remain Cherokee citizens if they wish to retain their tribal affiliation and associated services and protections hardly constitutes a "disastrous consequence[]" (Pet. 21) warranting review in this Court.[19]

4. The final basis urged for granting review is that two sentences in the court of appeals' decision regarding the importance of an agency following its own regulations, including the Secretary's regulations governing the recognition of Indian Tribes (25 C.F.R. pt. 83), somehow place into jeopardy the federal recognition of any number of other Indian Tribes that did not follow those regulations. But that is simply not so, for the court of appeals took care to note that it was striking down the Secretary's decision on this alternative ground only because "[t]he [Secretary] used *a procedure heretofore unknown to the law–'retract and declare'*–to purportedly re-recognize the Delawares." Pet.

---

[19] To the extent the petitioner is referring to the more substantial and numerous contracts with the Secretary (and other agencies) that the petitioner secured after 1997 (discussed at the time petitioner sought a stay of the mandate), petitioner (like the Secretary) was on full notice as of the D.C. Circuit's July 1997 published decision that its newly-minted "recognition" was on thin ice. It is not the Tenth Circuit's ultimate ruling that is the source of any hardship, but the petitioner's decision after 1997 to enter into contracts for services (which petitioner's members were already eligible to receive from the Cherokee Nation), while its "tribal" status remained seriously in doubt in the courts. In all events, such consequences do not provide a basis for review in this Court.

25a (emphasis added). *See also infra* 17a (criticizing same). A ruling striking down such an extreme abuse of administrative process is plainly limited to its facts and context. In short, the court of appeals' decision is appropriately tailored to the conduct to which it is targeted.[20]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

A. DIANE HAMMONS
JOHN E. PARRIS
CHEROKEE NATION
DEPARTMENT OF JUSTICE
P.O. Box 948
Tahlequah, OK 74465
(918) 456-0671

* Counsel of Record

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Respondent Cherokee Nation

---

[20] Petitioner's argument that the Secretary has unbridled "power to correct errors" (Pet. 27) outside the framework of the Federally Recognized Indian Tribe List Act, Pub. L. 103-454, 108 Stat. 4791, *codified in part at* 25 U.S.C. §§ 479a and 479a-1, and its implementing regulations is plainly overbroad. Under that rubric, the Secretary, regardless of the actual circumstances, could declare her prior failure to recognize *any* group of Indians as a tribe to be an "error" and thus wholly circumvent the law. *Infra* 25 n.15.